

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 ABDIQUAFAR WAGAFE, et al., on)
behalf of themselves and) C17-00094-RAJ
5 others similarly situated,) SEATTLE, WASHINGTON
6 Plaintiffs,) May 14, 2020 -
7 v.) 9:30 a.m.
8 DONALD TRUMP, President of the) TELEPHONIC MOTIONS
United States, et al.,) HEARING
9 Defendants.)
10)

11 VERBATIM REPORT OF PROCEEDINGS
12 BEFORE THE HONORABLE RICHARD A. JONES
13 UNITED STATES DISTRICT JUDGE

14
15 APPEARANCES:

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1 THE COURT: Good morning. This is Judge Jones.

2 MR. KIPNIS: Good morning, Your Honor.

3 THE CLERK: Thank you, Your Honor.

4 We are here in the --

5 THE COURT: Victoria?

6 THE CLERK: -- the matter of -- Yes.

7 THE COURT: Go ahead and proceed, please.

8 THE CLERK: Thank you. Yes.

9 We are here in the matter of Wagafe, et al., versus Trump, et
10 al., Cause No. C17-94, assigned to this Court. We do have our
11 court reporter, Nickie Drury, on the line.

12 For those counsel who will be speaking today, if you could
13 please identify yourself for the record.

14 MR. HEATH: Good morning, Your Honor. This is Heath
15 Hyatt speaking on behalf of plaintiffs.

16 MS. BRAGA: Good morning, Your Honor. Victoria Braga
17 speaking on behalf of defendants.

18 MR. BRINKMAN: Good morning, Your Honor. Drew Brinkman
19 on behalf of defendants.

20 MR. KIPNIS: Good morning, Your Honor. Brian Kipnis,
21 Assistant United States Attorney, for defendants.

22 MS. SLACK: Good morning, Your Honor. Michelle Slack,
23 Department of Justice, on behalf of defendants.

24 THE COURT: All right. Thank you.

25 THE CLERK: Your Honor, for the record, the public has

1 been notified of this hearing and has been provided the bridge
2 line and access code by way of a posting on the court's public
3 website. Thank you.

4 THE COURT: All right. Thank you all for being present
5 and available today.

6 The Court has called you in to discuss four distinct motions,
7 and I also want to cover a couple other matters as well, and
8 that's the case schedule, which we need to talk about -- we will
9 do that at the end of this proceeding -- and the trial date and
10 also the sanctions motion, which is still outstanding.

11 The primary reason why I have brought you here is to deal
12 with the four motions. And to be honest with you, the practice
13 is getting to be a little bit unwieldy, and since we don't have
14 deadlines in some of the components of the case schedule, it was
15 advisable for this Court to call the parties to try and address
16 this concern.

17 I think you already know the difficulty that we all
18 experience and face being in the COVID-19 shutdown, and there
19 certainly hasn't been a slowdown in the volume of work that this
20 Court has engaged in and the challenges that we face, not just in
21 this particular case, but in high-volume criminal motions
22 practice for compassionate release, as well as a variety of other
23 civil cases, that this Court is facing at this point in time.

24 The Court has been adequately briefed by the four motions, so
25 there's no real need for extensive argument, and the Court is not

1 going to allow that to take place. My primary concern is what
2 efforts have you engaged in and why haven't you engaged in a more
3 meaningful effort to resolve some of the conflicting motions.

4 Now, as I've indicated, I have discrete questions to ask. My
5 impression is, then, rather than working toward resolution, the
6 parties are satisfied with debate of why you can't comply versus
7 what you can do and how to break the logjam. Now, it's always
8 this Court's preference to have the parties have their own hand
9 in crafting resolution. This Court is fully prepared to come to
10 a conclusion and issue an order, but it's always far better for
11 the parties jointly to have their say in what the outcome should
12 be because that's a resolution that they come to.

13 Now, I'm going to go through the motions one at a time. I'm
14 not looking for -- While you shouldn't look for a formal
15 decision today, I may indicate from time to time which way I'm
16 leaning. And I'm not certainly looking for additional briefing,
17 so please do not file any supplements to existing motions unless
18 you are asked by the Court to do so.

19 So we will begin first with the defendants' motion to compel.
20 I believe that's Docket No. 289. Now, my first question goes to
21 the defendants. It appears from the briefing that the defendants
22 have abandoned the request for the admission component of the
23 motion; is that correct?

24 And the reason I'm saying this is, the plaintiffs indicated
25 they were admitting or denying, and there is zero in the reply

1 from the government. So we're left with the motion regarding two
2 specific interrogatories. Is that a fair assumption or
3 conclusion, counsel for the defendants?

4 MS. BRAGA: Yes, Your Honor, that's correct.

5 THE COURT: All right. Thank you.

6 And I will state for the defense -- Well, what steps have
7 been undertaken since the motion was filed to narrow the scope of
8 your requests or what can be resolved? Now, I'm sensitive to
9 plaintiffs' characterization of the request as fitting under,
10 using their words, "blockbuster" or blunderbuss" approach
11 because of the contention that the two interrogatories are
12 overly overbroad and/or unduly burdensome.

13 Now, I will also let you know, counsel, during years I have
14 been on the bench or in the years of my practice, any time a
15 party begins an interrogatory with "Identify all," that is going
16 to be problematic in the outcome.

17 Now, my practice is that key for the likelihood of success on
18 a motion to compel is what specific information are you looking
19 for. It appears that the plaintiff offered a proposed compromise
20 and then this motion was filed without resolution. Now, perhaps
21 you have had other discussions and conversations that I'm not
22 aware of, but I will give you an example. On page 12 of
23 plaintiffs' response or opposition, they made a proposal: We
24 will give you "principal or sample documents that support a
25 specific allegation." Why wasn't that type of proposal accepted?

1 So I know I have made a lot of statements, so I will give you an
2 opportunity to respond to those questions.

3 MS. BRAGA: Thank you, Your Honor.

4 We did meet and confer with defense counsel regarding --

5 THE COURT: Counsel, please identify yourself before you
6 begin.

7 MS. BRAGA: Oh, I apologize. This is Victoria Braga for
8 the defendants.

9 Defendants' counsel and plaintiffs' counsel did meet and
10 confer prior to the filing of this motion. Defendants had
11 offered a compromise to plaintiffs, a more narrow interrogatory
12 asking for an identification of persons who had material
13 information in support of their claims and a summary of that
14 information and also an identification of material facts that
15 support their claims and the identification of key documents that
16 support those facts. Plaintiffs' response, which I believe you
17 just quoted from, was an indication to us that plaintiffs were
18 rejecting that compromise offer and, instead, plaintiffs
19 continued to offer only to identify categories of documents and
20 to offer to provide sample documents where we requested them.

21 We were hesitant to accept that offer because plaintiffs'
22 initial identification of categories of documents identified very
23 broad categories, including all of the documents that defendants
24 had produced in response to plaintiffs' requests for production.
25 That totals 40,000 documents, and we did not believe that

1 offering a sample of a range of documents that large while
2 continuing to maintain that plaintiffs might rely on the entire
3 category of 40,000 documents was sufficient. Plaintiffs also did
4 not offer to link any of the information that they were willing
5 to provide us with to any specific allegation or complaint. So
6 we were not satisfied that plaintiffs would be willing to provide
7 us with anything more than what they had offered in their
8 responses to our interrogatories, which were entirely too broad.

9 THE COURT: Did you accept any proposal to say let's try
10 and you submit your representative samples so we can look and see
11 if they meet what our expectations are, or did you just lock down
12 and say that's not acceptable?

13 MS. BRAGA: I think there was a little bit of a timing
14 issue. If I remember correctly, that e-mail was sent by
15 plaintiffs just two days before the filing deadline. So we were
16 not confident that we were able at that point to reach an
17 agreement.

18 Again, the hesitation is that allowing plaintiffs to identify
19 a sample of a category as broad as 40,000 documents would leave
20 open the possibility that plaintiff could rely on entirely
21 different documents as we move forward in the litigation, and we
22 believe it's unfair to defendants, who have bore most of the
23 burden to this point in discovery, to have plaintiffs not
24 meaningfully and sufficiently respond to our interrogatories,
25 especially in the compromised fashion that we have offered to

1 them.

2 THE COURT: If you had that fear, counsel, is there any
3 reason why you couldn't give them the opportunity to give you the
4 samples and see if your fears were borne out as opposed to filing
5 a motion premised only upon fear?

6 MS. BRAGA: Again, I think there was a bit of a timing
7 concern. You know, plaintiffs didn't respond to our
8 interrogatories until soon before what at that point was the
9 motion filing deadline. So we were forced to meet and confer
10 during -- in a limited time frame. Again, I think that we --
11 Our belief is that if plaintiffs are maintaining that they are
12 going to be able to identify these broad categories of documents
13 as they have and then just provide a sample from each of those
14 categories, the worry is that the categories are so broad that
15 plaintiffs will be able to rely on entirely different information
16 than the sample that they provide to us.

17 THE COURT: Have you proposed an agreement, counsel, to
18 restrict that concern?

19 MS. BRAGA: Well, our identified -- or our proposed
20 compromise was to ask plaintiff to identify persons who had
21 material information in support of their claims and to summarize
22 that information and also to identify the material facts to
23 support their claim and to identify key documents that support
24 those facts.

25 THE COURT: So what's your next move going to be,

1 counsel, if the Court denies your request to compel?

2 MS. BRAGA: I'm sorry. Again?

3 THE COURT: What's your next move going to be then,
4 counsel, if the Court denies your motion? Then you are back to
5 square one. So I'm trying to move you in a direction of looking
6 toward resolution as opposed to conflict.

7 MR. KIPNIS: Your Honor, this is -- I'm sorry, Your
8 Honor. This is Brian Kipnis. May I be heard for -- just on that
9 point?

10 THE COURT: Certainly.

11 MR. KIPNIS: So, Your Honor, I take it from your
12 comments that you think that what we were asking for and what
13 we're reaching out for on these negotiations was too broad. But,
14 frankly, Your Honor, I sat across at a deposition taken by the
15 plaintiffs in which they had a subset of these documents very
16 well organized in a set of binders, so they had made this
17 particular sorting already. So I suppose the next thing we would
18 be asking for is, to the extent they have already identified a
19 subset of these key documents, that's all we're interested in.
20 So we're not really asking them for something they haven't
21 already done, Your Honor. We could see it during the
22 depositions.

23 THE COURT: Okay. All right. Any further response to
24 the questions the Court posed to the defendants? Ms. Braga?

25 MS. BRAGA: No, Your Honor. Thank you.

1 THE COURT: All right. Let me hear from Mr. Hyatt.

2 MR. HYATT: Good morning, Your Honor. Thank you.

3 The plaintiffs believe that their responses and objections to
4 the interrogatories were proper and are still proper. We did
5 make an offer to defendants' counsel to help resolve this
6 dispute. We stand by that offer. And, you know, we would be
7 willing to consider any fair counterproposals or a compromise to
8 our offer, but, you know, at the time of negotiations, that did
9 not happen. So I think that's all that I have to say.

10 Certainly plaintiffs are still concerned about the breadth of
11 the interrogatories. Even with defendants' proposed compromise,
12 they are still asking for, really, an annotation of a
13 293-paragraph complaint, and we would need a little bit more
14 specificity and narrowing of the interrogatory in order to
15 respond to it in the way that they would be satisfied.

16 And unless you have any specific questions, Your Honor,
17 that's the conclusion of my remarks, and we ask that you deny the
18 motion to compel.

19 THE COURT: Well, I do have some additional questions,
20 counsel. One is, when is the last time you had contact or
21 discussions about this particular issue?

22 MR. HYATT: Your Honor, I believe it was in mid-October,
23 shortly before this motion was filed. I am looking for the exact
24 date in my notes. But I believe it was shortly before that.

25 THE COURT: I don't need an exact date, counsel, but my

1 concern is, when you file these motions, that doesn't mean that
2 you just put your hands in various spans and not continue to
3 negotiate and work toward center. Because that means from
4 October until now the parties have done absolutely nothing toward
5 resolving this conflict. And, counsel, that's not going to
6 advance your case.

7 We've got a large, an extremely large caseload. I have got
8 criminal cases right now that if I just tried criminal cases for
9 the balance of this year, that could absorb all of my docket
10 because it's high volume and it has been postponed and continued.
11 I have another trial, a criminal case that's set, assuming we can
12 get started with a COVID-19 trial, a post COVID-19 -- that's
13 simply going be the case -- that's going to be a four- to
14 six-week trial in January.

15 So the reality of this case getting to trial any time soon
16 without some clear and clean preparation to getting conflicts
17 resolved is going to present a problem. And so you just can't
18 sit and do nothing for months toward resolving the conflict and
19 not meeting. Counsel, you have got a lot more time on your hands
20 I think right now because you are not in an office setting. I'm
21 not sure what your caseloads are like, but I know what ours are
22 looking like.

23 Now, counsel for the defendants have represented that they
24 have -- that you have organized binders and that you have key
25 documents and you've identified and structured your materials in

1 a way that's easy for you to access and to be able to present.
2 And I'm not asking you to turn over, you know, work product.
3 That is not what I'm suggesting. But what I am looking for is,
4 what can you do by way of the organization that you've completed
5 to try and make some meaningful response to what is being
6 proposed by the defense?

7 MR. HYATT: Certainly, Your Honor. And I appreciate
8 your comments and certainly take them to heart, and we will
9 endeavor to work with defendants to resolve this issue,
10 certainly, and other issues that we encounter as this case
11 progresses as well.

12 In terms of what we can offer at this point, we're certainly
13 willing to work with the defendants to reach a resolution on this
14 issue. We are certainly, as you noted, Your Honor, concerned
15 about turning over certain work product.

16 Other issues that we have with turning over subsets of
17 documents is, one, that that would in some ways be binding on us
18 as key documents that would be offered, and certainly we wouldn't
19 want that to be the case.

20 But the last thing I will note is the subset of documents is
21 what we offered, and, you know, we thought that was a fair
22 compromise, and we would be willing to negotiate with the
23 defendants again on this issue and continue the discussions.

24 THE COURT: All right. Counsel for the defense, let me
25 hear from you on this last proposal regarding the subset and

1 where that would stand with your position?

2 MS. BRAGA: We are willing to meet and confer with
3 plaintiffs' counsel about that. As plaintiffs' counsel was
4 saying, we are not asking that they identify all documents.
5 That's why we have compromised to key documents. As I said
6 before, our hesitation to accept a subset of a category as large
7 as 40,000 documents is that the subset in no way could be
8 representative of so many documents. So the categories
9 themselves need to be narrowed in order to focus on key
10 documents.

11 As Your Honor was saying, it is important, we feel at this
12 point, to narrow the scope of the issues in this case, and as
13 Attorney Kipnis just explained, it seems that plaintiffs' counsel
14 has done the majority of the work to narrow the documents, and we
15 are hopeful that in further communications with them, they can
16 produce for us the documents and the information that will help
17 us move forward with this litigation.

18 THE COURT: Counsel for the plaintiffs, counsel keeps
19 making reference to the 40,000 documents. I've handled extremely
20 large cases. What's a realistic number in terms of what
21 documents that you plan on utilizing for purposes of this trial,
22 to the extent that you know right now, based on the discovery and
23 based upon your trial preparation?

24 MR. HYATT: I don't think I could give you an exact
25 answer on that, Your Honor. The documents right now are

1 certainly likely in the hundreds, but, you know, not in the
2 thousands. Most likely, my guess is in the hundreds. Again, you
3 know, for trial, it will ultimately depend on what issues are
4 resolved through dispositive motions and other things, and so I
5 would also qualify my answer that way.

6 THE COURT: Well, counsel, is there some reason why you
7 couldn't create by agreement, not that you are bound, tightly
8 bound, but to get away from this illusion of this 40,000 subset,
9 40,000 documents, be able to create some type of syllabus that
10 would narrow the scope of the hundreds of documents now that
11 we're talking about so it would make it easier for the defendants
12 to have an appreciation for the direction that you're going so
13 they can defend themselves? Is that something that realistically
14 can be done between the parties?

15 MR. HYATT: Yes, I believe that is something that could
16 be done between the parties.

17 The only concern that we would still have, Your Honor, is the
18 scope of the interrogatories. And so the defendants would have
19 to meet us part of the way as well in narrowing the specific
20 issues that they are looking for and not just this, you know,
21 sort of subset, annotated version of the complaint that has been
22 our fear all along.

23 THE COURT: All right. Well, counsel, unless you have
24 something more to add, the Court has given you its concerns.
25 I've already indicated in my preliminary direction that I'm

1 inclined to deny the motion. I'm hoping that counsel can narrow
2 the scope of what you're looking for. This meet is the key to
3 resolving this particular issue.

4 And, counsel, the 40,000 unwieldy number of documents, you
5 certainly can come to an agreement as to what you're providing
6 and what limitations and restrictions can be placed on what
7 you're providing. That can be done by way of agreement and
8 stipulation that the Court can look at and make a determination
9 to accept or not, in lieu of burdening the Court with more
10 motions to compel.

11 Is that clear on Motion No. 1, counsel? Counsel for the
12 defendants?

13 MS. BRAGA: Yes, Your Honor. Thank you.

14 THE COURT: Counsel for the plaintiffs?

15 MR. HYATT: Yes, Your Honor. Thank you.

16 THE COURT: All right.

17 MR. HYATT: Yes, Your Honor. Thank you.

18 THE COURT: All right. Thank you.

19 Let's move now to Question No. 2.

20 And also for the benefit of the court reporter, I think we
21 have got a lot of people speaking, so if at some point in time
22 I'm going too fast, as I sometimes do, or counsel is going too
23 fast, or if we're not clear enough, would you agree that you
24 would let us know, so that you can stop and interrupt us?

25 THE COURT REPORTER: Yes, Your Honor. This is Nickie.

1 Thank you.

2 Your Honor, if you could move closer to your speaker or your
3 phone, I would appreciate that as well.

4 THE COURT: I will take my headset off. Thank you.

5 THE COURT REPORTER: Are we ready?

6 THE COURT: Is that better?

7 THE COURT REPORTER: No.

8 THE COURT: Okay. Is that better?

9 THE COURT REPORTER: Yes, Your Honor. Thank you.

10 THE COURT: Okay. Good. Thank you. Let me know if it
11 changes at any point in time. I'm taking my headset off.

12 The second motion is Docket No. 309. That's the plaintiffs'
13 motion for permission to interview a limited number of persons.
14 Again, since this Court is inclined to grant this motion, the
15 questions I have are primarily directed to the defense.

16 Now, counsel, it appears that a number of people have
17 responded to the notice and have contacted the Perkins attorneys.
18 It appears that the scope of follow-up interviews affirmatively
19 states that the Perkins lawyers would not confirm or deny
20 whether any individual's experience was subject to CARRP and that
21 they merely wished to gather information about the experiences in
22 applying for immigration benefits. I'm looking specifically at
23 Document 310-1, Exhibit B, or in the briefing at 309, page 6,
24 because they list a series of specific inquiries that they would
25 make. So it's not like they're trying to hide what the questions

1 are going to be or what the scope would be. But I would like to
2 go through or you to go through -- if you could pull that docket
3 up and look at each one of the questions and explain your
4 objections and let me know what your general concerns are.

5 Now, you continue to advance the argument with the general
6 claim of national security without specifics, and that's
7 insufficient. If your concern is that the people or persons
8 being investigated, or possibly investigated, would alter or
9 change their behavior or impede other investigations, does that
10 really serve as justification, if that person suspected that they
11 were a target, that their behavior issue is going to change? It
12 would appear that they've contacted the Perkins attorneys. Maybe
13 they have already that fear, and that's water under the bridge.

14 To me, I look at this like there's a wiretap in a criminal
15 investigation. If the suspect gets wind of a wire that's up,
16 they're going to change their behavior long before they're
17 contacted by the police or arrested because they have suspicions,
18 not because an officer told them that they were suspects. That
19 appears to be almost where we are right now.

20 So if you would give me a general response to what concerns
21 you have about the issues I've relayed and also go through the
22 specifics of the questions which are raised by counsel. So if
23 you would take it from there, counsel. I'm not sure who is going
24 to respond to this one.

25 MR. BRINKMAN: Yes, Your Honor, this is Drew Brinkman

1 for the defendants.

2 The concerns we have -- Well, first, I want to remind you of
3 what the class -- The 50-case sample we provided that got us
4 this protective order in the first place, I want to remind you of
5 what that sample said. And, you know, these are -- these are --
6 we don't know who these people that plaintiffs want to contact
7 are, but we do know who the 50-case sample are. So we think that
8 shows there are serious national security concerns with this
9 class in general.

10 With respect to the argument that these unnamed class members
11 already confessed that they are subject to CARRP, we said in our
12 response that there's a -- we think there's a qualitative
13 difference between someone suspecting that they're subject to
14 CARRP and then the plaintiffs potentially confirming it without
15 saying it directly by contacting them in connection with this
16 case. And we cited a case from the D.C. Circuit where the judge
17 used -- the circuit court used a reading similar to that where
18 they said, well, it really doesn't matter what people think; this
19 is official confirmation that it's true. That's a big difference
20 from a national security perspective.

21 So while I understand the plaintiffs -- you know, that they
22 say they won't tell these people directly whether they were
23 subject to CARRP, I don't know how these people wouldn't surmise
24 that they were subject to CARRP, regardless if the plaintiffs
25 tell them.

1 And we also noted, and I agree, that there's more that the
2 plaintiffs -- You know, the plaintiffs don't know who
3 these people -- what derogatory information the government has on
4 these said people, and the plaintiffs don't know these people's
5 true intentions, and it is certainly possible that these people
6 are trying to see whether the government has derogatory
7 information on them. And, you know, it is somewhat speculative,
8 but I think it's speculation grounded in logic.

9 And then turning to your questions about --

10 THE COURT: Let me ask a follow-up question, counsel.
11 Where in the identified number of questions that counsel for the
12 plaintiffs have proposed are they attempting to elicit derogatory
13 information that the government may or may not possess? Can you
14 point to one of the questions that you think answers that?

15 MR. BRINKMAN: No. Well, no. No. That's not a
16 question the plaintiffs would ask.

17 But I'm saying the people that -- the plaintiffs' counsel
18 don't know what derogatory information the government has. So
19 these people could be truly bad actors, but they're telling
20 plaintiffs' counsel, "We're not bad actors, we can suspect we are
21 subject to CARRP, and we're innocent people." So it's sort of an
22 unknown at this point is my point.

23 THE COURT: What I'm saying, counsel, these are discreet
24 questions that are being posed to these individuals. It's not
25 giving any information. It's not eliciting any answer from them

1 as to their suspicions about derogatory information. They're
2 talking about processing. So I guess I'm at a loss as to your
3 expressed concern about the derogatory information and how that
4 would come out in this type of interview.

5 MR. BRINKMAN: Well, the mere fact of contact, I think,
6 suggests that the government has derogatory information on these
7 individuals because it's public knowledge that the plaintiffs'
8 counsel have a class list, and if the plaintiffs reach out to
9 these people to talk to them about this case, I don't know how
10 these individuals wouldn't reason that the government has
11 derogatory information on them. Why else would plaintiffs'
12 counsel be reaching out to them?

13 THE COURT: Wouldn't the category of people that they've
14 identified be the people that have already contacted Perkins as
15 opposed to Perkins acting on the issue on their own from the very
16 beginning?

17 MR. BRINKMAN: Yes. Of course.

18 THE COURT: So --

19 MR. BRINKMAN: Go ahead.

20 THE COURT: In other words, Perkins is not saying that
21 we're going to go out and randomly pick six people and ask
22 questions. Perkins is in a situation where these people have
23 already contacted them and then Perkins is following up on that
24 contact. Isn't that dramatically different from what you are
25 identifying for the Court?

1 MR. BRINKMAN: I don't think so. I mean, I'm talking
2 about the same scenario that you are talking about.

3 Our point is that these people might reach out to Perkins to
4 try and figure out whether they're on the class list, and the
5 mere fact that Perkins follows -- you know, reaches back to them,
6 after the individuals contact Perkins, that essentially confirms
7 that these people are on the class list.

8 THE COURT: All right. Please continue, counsel. I
9 think we've reached a point where we're not going anywhere on
10 that point. Please continue.

11 MR. BRINKMAN: Well, I guess -- I'm just walking
12 through -- you asked me to walk through the questions --

13 THE COURT: Right. Go ahead.

14 MR. BRINKMAN: -- you know, that Perkins Coie would ask
15 these folks.

16 THE COURT: Right.

17 MR. HYATT: Question one: Why they contacted us with
18 respect to the notice? I'm not sure what they're getting at
19 with that, but I'm not sure how it would be relevant.

20 Do they have a pending application for benefits? Well,
21 Perkins -- the plaintiffs should already know if they have a
22 pending application for benefits and what type of application
23 because we provided class lists that show who was in the class.
24 So they shouldn't be learning anything new from that question.

25 When the application was filed? Again, that's provided in

1 the class list, so the plaintiffs shouldn't learn anything new
2 from that question.

3 If there was a decision? They should also know because that
4 would be in the class list.

5 What the decision was? They wouldn't know. And that's
6 something perhaps that we could provide. If, you know, there was
7 a decision for these six folks, we can provide a decision, I
8 think. I would have to check with our clients, but that seems
9 fairly easy.

10 Whether it was pending for longer than six months? I think
11 that should be in the information we provided. The class list
12 should show that.

13 If they were ever informed if the application was subject to
14 CARRP? I mean, we know that USCIS generally does not tell people
15 if their cases were subject to CARRP. We've admitted that. So I
16 don't really know how that adds to the litigation.

17 Have there been personal or familial consequences if the
18 application was pending for longer than six months? That's
19 something only the applicant could tell. At least the
20 government, actually, I don't think could proffer that
21 information to the plaintiffs. But we don't think that's
22 relevant. We think that will distract from the central issue in
23 the case, which is whether CARRP is lawful as to the class as a
24 whole.

25 I don't think we should be getting into a back-and-forth

1 about individual applications. The plaintiffs presumably are
2 going to be trying to put up evidence of someone that was subject
3 to CARRP, they waited a long time, and their case was denied,
4 because that fits their narratives. Well, then, we could put up
5 evidence of someone that was put into CARRP, you know, waited a
6 short time, and their case was approved. I don't think a
7 back-and-forth like that advances the case. It's just a
8 distraction from it because the Court has said, you know, the
9 facts -- the facts for each individual class member are
10 irrelevant; it's whether CARRP is lawful to the class as a whole.

11 And then the last two, I mean, I really don't have anything
12 to add on those. But does that give you any sense of where we're
13 coming from?

14 THE COURT: That answers somewhat, counsel.

15 MR. KIPNIS: Your Honor, this is Brian Kipnis again.
16 Can I just see if I can clear -- get us clear on one point just
17 to -- I'm sure you understand our position.

18 We are not certainly accusing Perkins of doing anything
19 consciously to confirm these people are in the CARRP program, but
20 we think necessarily by responding to these people who are --
21 responding to those out of the blue that they are -- that they
22 think they may have been in the CARRP program, Perkins is going
23 to reach out to them based on whether they're -- you know, what
24 their circumstances are, whether their name appears on the class
25 list. Just simply by Perkins' interest in their case, there's a

1 confirmation that those people are in the CARRP program. There
2 would be no other reason for them to be contacted.

3 To your point that this is speculative, it is speculative in
4 the sense that we don't know who these people are so we couldn't
5 possibly give you concrete information about what their
6 individual circumstances are. We're not able to do that. But we
7 do know that they were culled from a list which is populated by
8 people who are in this category for a reason. We believe them to
9 be a risk, and there is derogatory information on them. We don't
10 know in any of these individual cases how serious that is. It
11 could be, in a worst case scenario, that it is serious. And
12 perhaps it's speculative to say that, as this is your concern,
13 Your Honor, but we have no other ability but to speculate because
14 we don't know who these people are that Perkins is selecting.

15 So we're kind of in a quandary. We're trying to do our job
16 here. We're trying to protect the country by being as
17 risk-adverse as we can, and we're doing our best under the
18 circumstances, but the situation is just unusual because we're
19 all circling around unknowns. We don't know who these people are
20 and so we can't give you anything more than speculation about the
21 danger, but we do know that they are in a class of people who are
22 dangerous. So that's our concern in a nutshell, Your Honor.

23 And we don't think that the reward -- This is a risk-reward
24 situation. There's some risk. The question is: Does the reward
25 justify the risk? And what we're trying to say is this is a case

1 that is based upon a theory that if the government has been
2 unlawful as to one person, it's been unlawful to everyone for the
3 same reason because individual circumstances do not identify our
4 liability but identifies our liabilities that we are globally
5 wrong globally carrying out a program that's unlawful. So what
6 we're saying is we're undertaking this risk for something that
7 doesn't really advance the case because it is a global case, not
8 one that's based on individual circumstances. So that's what
9 we're trying to say.

10 THE COURT: Let me ask you this, counsel. If your
11 concern is the impression that this will give upon the
12 interviewee, is there a preamble that could be agreed upon
13 between you and plaintiffs' counsel which would make the
14 statement that you, the interviewee, have contacted our firm, we
15 are not confirming or denying that you are the subject of this
16 litigation; the only purpose of our investigation or interview is
17 to obtain background information for our case, or words to that
18 effect, or along that line? That's just coming off the top of my
19 head, counsel. Something that would alleviate some of the
20 concerns that you have.

21 Do you think that type of preamble -- and I know it's
22 not bulletproof by a long shot -- but that's something that could
23 advance trying to control the perception that people have that I
24 am a target, I am being investigated, the government does have
25 the derogatory information by the mere fact that Perkins is

1 contacting me.

2 MR. KIPNIS: Well, you know, I mean, we prefer that they
3 don't know that we have derogatory -- I mean, this is the last
4 point, Your Honor -- but we don't want them to know that we have
5 derogatory information. That's the thing that we're trying to
6 avoid.

7 And there's also an issue that I think has not been talked
8 about. We don't really know what the ongoing relationship of
9 these people with Perkins is going to be. Because, after all,
10 these people are Perkins' clients, right, so they can't be --
11 they can only be so cagey about what their ongoing relationship
12 is with them, consistent with their ethical obligations. There's
13 an attorney-client relationship there. There's so many unknowns
14 about how -- this can be so complicated -- about how this would
15 go forward when they are contacting people who are their clients
16 but not really telling them they're the clients, but signalling
17 by their interest that they are their clients. And from our
18 perspective, all of this serves to confirm something that we're
19 trying to protect. So that's our concern, Your Honor.

20 THE COURT: I still didn't get a reaction from you,
21 counsel, in terms of trying to put some language in at the
22 beginning that would address your specific and precise concerns
23 of avoiding any impression of how these interviewees accept the
24 fact that they were contacted in the first place.

25 MR. KIPNIS: Our position is, Your Honor, if that's

1 something that you want us to try to work out with plaintiffs'
2 counsel, we will try. I guess if I'm -- and I apologize if it
3 seems like I dodged your question because I'm hesitant to say
4 that I think that that's workable. But we're willing to try,
5 Your Honor. We will give it a try, to see if there's something
6 we can work out.

7 THE COURT: Counsel, I'm not requiring them -- again,
8 I'm trying to break up the logjam.

9 MR. KIPNIS: I know, Your Honor.

10 THE COURT: Give you some ideas to try and stimulate
11 some conversation or discussion between the parties to try and
12 come to resolution. But unless you have something else to add,
13 Mr. Kipnis, I will go to the plaintiffs.

14 MR. KIPNIS: No. That's all, Your Honor. Thank you.

15 THE COURT: All right.

16 And did Mr. Brinkman have anything else that he wanted to add
17 before I ask plaintiffs' counsel some questions?

18 MR. BRINKMAN: The only thing, Your Honor, is I think --
19 Well, there's the function of the initial interview, and, you
20 know, you're sort of focused on that, but I think it gets even
21 tougher as we get down the line in the case. If the plaintiffs
22 want those people to testify, which they say they do, I really
23 don't know how these people won't know that they have been
24 subject to CARRP. It's just another step down the line where it
25 just becomes inevitable that that's revealed. So that's the only

1 thing I would add.

2 THE COURT: Okay. Thank you.

3 Counsel for the plaintiffs, you have been patiently sitting
4 there waiting. I want to hear your response to some of the
5 concerns that have been expressed. But before you get to that,
6 if you do seek the information in the interview and the questions
7 that you've identified for the defendants and the Court -- and
8 I'm looking down the road as far as admissibility versus
9 relevance; the relevance standard is a fairly low threshold, so
10 we're talking about admissibility -- have you considered what the
11 benefit and what you are going to do with this information for
12 trial purposes and how this type of evidence or what rules of
13 evidence this type of information would be permissible or
14 admissible at trial?

15 MR. HYATT: Yes, Your Honor, we have considered that.
16 And we do believe that the stories of these unnamed plaintiffs
17 are both relevant, as the Court has already ordered, and
18 inadmissible -- admissible, excuse me, at trial through a number
19 of different vehicles. You know, first, these are stories of
20 witnesses, folks that have had their applications sidelined by
21 CARRP, and, you know, that story and the injuries that they have
22 suffered as a result of CARRP and the program itself certainly
23 would be admissible, Your Honor. But to add a little bit more
24 specificity to this, these stories are something that our experts
25 may rely on, our experts may use, as a part of their reports,

1 which, you know, may need to be supplemented. You know,
2 plaintiffs have already submitted expert reports in this case,
3 but certainly if there are additional stories from our unnamed
4 plaintiffs, there may be some addition to those expert reports.

5 But, Your Honor, going back to your question about thinking
6 down the road, the time for those types of conversations and for
7 defendants to raise their objections to admissibility questions
8 are through motions in limine. The phase that we are at in this
9 case, Your Honor, is still discovery, and we have the right to
10 reach out to our unnamed class members, to hear their stories,
11 and certainly we are asking to exercise that right through a
12 slight modification of the protective order.

13 I hope that answers your question. And I will wait to sort
14 of further get into a response to the defendants' concerns.

15 THE COURT: All right. Let's now go to the plaintiffs'
16 concerns.

17 MR. HYATT: Yes, Your Honor. Thank you.

18 The purpose of these interviews, Your Honor, is to gather
19 these people's stories. The questions that we have laid out --
20 and, frankly, we've been very transparent about the categories of
21 information for which we seek -- are aimed exactly at that. We
22 want to understand the real impact on people's lives of this
23 program, how they're impacted, and what the results of this
24 program have been on these people.

25 In terms of the harm, or fear of harm I should say,

1 defendants, I think, made it very clear that the harms that they
2 fear are still speculative and unknown, and that, Your Honor, is
3 not enough to restrict communications between counsel and unnamed
4 class members.

5 The next point on this is to, again, reiterate that these
6 individuals contacted us not by a communication directly to class
7 members but through a public notice. So any concern that the
8 government has or the defendants have about these people
9 confirming that they're subject to CARRP is, from our
10 perspective, a nonissue at this point because these people
11 already suspect that they may have been subject to CARRP. The
12 mere fact of us interviewing these individuals is not going to
13 add to that concern. But, you know, one thing that I would like
14 to highlight to the Court is that, you know, since the motion has
15 been filed, additional people have responded to the class notice.

16 And, you know, as a point of compromise, to alleviate
17 defendants' concerns, we will -- we would certainly be willing to
18 draft a preamble to make very clear that we will not tell them,
19 the individuals, whether they have been subject to CARRP or not
20 and that we are responding to them and their outreach to us.
21 But, also, Your Honor, we would offer to interview each person
22 who has responded to our notice and provided us enough
23 information so that we could be in contact with them again and
24 tell each other person that, that we are interviewing everybody
25 who has contacted us and who we can get back in touch with.

1 I think all of these safeguards, including this most recent
2 one that plaintiffs put forward, would alleviate any reasonable
3 conclusion that somebody is, you know, subject to CARRP merely
4 because we're reaching out to them. So I hope that certainly
5 alleviates the Court's concerns about there being any issues
6 here, but also the government's as well.

7 One more piece. Just thinking down the road here, Your
8 Honor. You have -- you issued a protective order with relation
9 to communications that plaintiffs, you know, can or cannot have
10 with unnamed class members. We have strictly adhered to that
11 protective order. And, you know, if you are to grant our motion
12 today, and the need arises for additional communications or
13 additional issues, we can certainly try and work those problems
14 out with the government beforehand, but, you know, the Court is
15 also obviously able to modify the protective order that it has in
16 place as well, should the need arise later on down the road.

17 The COURT: All right. Let me just check my notes,
18 counsel.

19 All right. That appears to answer the questions the Court
20 has. Is there anything by way of rebuttal, from the defense
21 perspective?

22 MR. KIPNIS: This is Brian Kipnis, Your Honor.

23 I heard Mr. Hyatt talk about more people, but this motion is
24 about the six people, as far as I know. Are they suggesting that
25 they are interested in contacting more than the six people that

1 are the subject of the motion?

2 THE COURT: Let me hear from counsel. Mr. Hyatt?

3 MR. HYATT: Thank you, Your Honor.

4 We offer that as a suggestion to alleviate any of defendants'
5 concerns. Though the motion itself does only indicate that we
6 are interested in reaching out to six individuals, you know, we
7 certainly would hope to interview everyone that has contacted us,
8 both as a means of compromise with the government, because we
9 think that's inherently a reasonable request, but also a
10 reasonable compromise to alleviate the defendants' concerns.

11 THE COURT: Well, what I can tell, counsel, from the
12 conversation we've had on Motion No. 2 is there are some things
13 that can be done to try and minimize some of the concerns by the
14 government, as well as some limitations in terms of what counsel
15 for the plaintiffs can do. So I'm going to stop here and move to
16 Motion No. 3, but it does appear that there can be some progress
17 made on that second motion.

18 The third motion is Docket No. 312. That's the motion to
19 compel documents withheld under the law enforcement or
20 deliberative process privileges. Now, my understanding is that
21 the request has been narrowed to a subset of 41 documents, plus
22 five from the certified administrative record.

23 The biggest issue the Court has is the parties are looking
24 for the Court to do the heavy lifting, to scour the docket to
25 find the documents. There are over 350 docket entries, and the

1 way the Court reads is that we're doing everything right now by
2 pure technology. We don't have the benefit of pulling out a
3 binder and setting up multiple binders to go through and look at
4 some of the exhibits and some of the documents. So we're having
5 to pore through and do, to be honest, the heavy lifting that the
6 parties should be engaged in.

7 Now, I will give you a specific example. Just one second.
8 Give me a second. I'm trying to pull it up on my computer.
9 Please be patient.

10 All right. Now, this one, this motion, essentially is asking
11 for two redactions on two separate documents. I have already
12 indicated 36 were produced to plaintiff in discovery and five
13 from the administrative record. Technically, six, but two of
14 them are almost identical. Now, the administrative record is
15 filed in the docket, so we have those files, those five, but the
16 Court can't find the remaining 36 documents.

17 Now, in the initial declaration, that's Docket No. 313,
18 you've indicated that -- it indicates that they did not attach
19 documents, but they would at a later date.

20 When we were looking for it --

21 THE COURT REPORTER: I'm sorry, Your Honor. Could you
22 repeat that?

23 THE COURT: Certainly.

24 Let me go back and look again. The administrative record is
25 filed on the docket, so we have those five documents, but it's a

1 challenge to the Court to find the remaining 36 documents.

2 Now, in their initial declaration, it's Docket 313, there is
3 an indication that they did not attach the documents, but they
4 would at a later date. And the Court has been looking on the
5 docket, but I think you may have forgotten.

6 For example, of the documents, we can't find any of the
7 documents in the reply brief, that is Docket No. 344, that begins
8 with the Bates DEF, for example, on page 1 -- and I will go
9 slow -- DEF, for defendant, -00021130 and DEF-00266453,
10 DEF-0004010, DEF-0009671, and then we transition to page 3,
11 DEF-00184286, DEF-00184291, and DEF-00184306. So that's my first
12 question in terms of the challenge that we're having finding
13 these documents.

14 It appears -- Again, going to the docket, Docket 341 and
15 344, there appears to be an effort by the plaintiffs to winnow
16 down what you are seeking in the 41 documents.

17 What additional negotiations have been undertaken since the
18 time this motion was filed to resolve this issue? That's a
19 question for counsel for the plaintiffs and also a question about
20 the documents being filed or not being filed.

21 MR. HYATT: Yes, Your Honor. I will address your second
22 question first, which is with respect to the documents.

23 You know, the procedural history, as you noted, with this
24 motion is a little bit complicated, and we certainly endeavored
25 to supply the documents to the Court under seal if it would have

1 been helpful to the Court to review the individual documents. I
2 believe that was what we did with the first motion to compel as
3 well. We would be happy to work with the defendants to make sure
4 that the documents that the Court would like to review are
5 available under seal with proper Bates numbers. There was some
6 reproduction of documents with lesser redactions, that the
7 parties tried to negotiate a resolution to this issue before
8 filing additional briefing for the Court. So, Your Honor, I
9 apologize for the confusion, and we will work with defendants to
10 make sure that the documents that are at issue, especially the
11 ones that you just outlined, are at the top or near the top of
12 the docket for your ease, and we will get that as soon as
13 possible to you under seal, if that would be most helpful to you.

14 As to your first question, the communications that have
15 occurred since the filing of the briefing -- well, I think what
16 you are really looking for, Your Honor, is communications that
17 have occurred since the end of the briefing occurred. You know,
18 there were conversations between the parties to try and narrow
19 the dispute, and we were successful in some regard before the
20 opposition and the reply was filed. After the motion was noted
21 for consideration, Your Honor, there had been very limited
22 discussions. No discussions with respect to this issue. There
23 have been limited discussions with respect to the law enforcement
24 privilege in general as the parties try and work out certain
25 claw-back requests that have been made. Those conversations are

1 ongoing. The parties have some fundamental disagreements about
2 what information should be subject to the law enforcement
3 privilege that we have been unable to resolve.

4 I will --

5 THE COURT: Well --

6 MR. HYATT: Oh, yes. Go ahead, Your Honor.

7 THE COURT: Go ahead.

8 MR. HYATT: I just want to finish this by saying, you
9 know, again, in the first motion, your instructions to counsel
10 are well taken, and, you know, we will certainly endeavor to
11 speak with opposing counsel and find more ways and try again to
12 sort of reach a resolution without the Court's involvement.
13 Certainly that happened the first time around, before this motion
14 was noted for consideration. But, you know, I wanted to make
15 sure you know we take your comments to heart and your
16 instructions to heart, and we will proceed accordingly.

17 THE COURT: One of the things, counsel, is that --

18 THE COURT REPORTER: I'm sorry. I'm sorry. Could you
19 repeat that, please?

20 THE COURT: I'm sorry. I'm sorry.

21 In the Emrich, E-m-r-i-c-h, declaration and the briefing, why
22 shouldn't the Court just look at this as just another motion for
23 reconsideration on an issue the Court has already ruled upon?

24 MR. HYATT: Yes, Your Honor. There are some -- well,
25 there are two issues here. First, there are categories of

1 documents that the plaintiffs have laid out in their reply brief
2 that plaintiffs believe, and the documents suggest, are
3 improperly redacted, consistent with Your Honor's most recent
4 order. For example, you know, plaintiffs believe that there are
5 internal USCIS information to which plaintiffs are entitled that
6 are still redacted. It may be documents such as interviewing
7 policies, vetting policies and procedures internal to USCIS,
8 USCIS policies on when USCIS officers should reach out to
9 third-party law enforcement agencies, or questions they should
10 ask to try and resolve potential national security concerns.
11 Certain examples used internally and internal guidance documents
12 are redacted beyond the personal identifying information that the
13 Court allowed the defendants to continue to redact. And so, Your
14 Honor, we believe that some of the redactions that the government
15 has imposed do not comply with your order, and we have moved for
16 them to lift those redactions.

17 And the second part, Your Honor, of this is -- Well,
18 actually, for this motion, that is the main -- that is the main
19 thrust of the argument.

20 With respect to information that is intertwined with third-
21 agency information -- I'm quoting from page 6 of the defendants'
22 opposition -- this intertwined information, Your Honor, is, at
23 least plaintiffs believe, is USCIS analysis of third-agency
24 information, and to the extent that there is USCIS analysis done
25 by USCIS officers, that information should be produced without

1 redaction.

2 Your Honor, one of the key parts of this case is USCIS's
3 determinations of an applicant's status as a potential national
4 security concern and how USCIS reaches that determination, how
5 they evaluate the information they receive, vet the information
6 they receive, and what criteria USCIS uses to evaluate the
7 information it receives. All of these things bear on the
8 determination that USCIS alone determines if someone else is or
9 might be a national security concern.

10 So there are categories of documents, Your Honor, that we do
11 not believe are -- that are improperly redacting USCIS
12 information, and we ask that you issue another order to unredact
13 that information.

14 THE COURT: Now, counsel, the references to the
15 third-party information and how it's used, how USCIS, I guess,
16 analyzed the information that they received, are you suggesting
17 that the defense would have to disclose the third-party agency
18 that provided the information and what they provided?

19 MR. HYATT: Your Honor, what they provided is not
20 necessarily something that we would require the defendants to
21 produce. What we're looking for, Your Honor, is exactly what you
22 have ordered in the past, that defendants be exacting with the
23 privilege and use a scalpel as opposed to an axe when they're
24 asserting the law enforcement privilege.

25 And, Your Honor, you have ruled that third-agency

1 information, information that originates from third agencies, is
2 privileged. We do not seek to have you reconsider that order.
3 But to more directly answer the second part of your question, we
4 believe that, you know, broad references to third agencies should
5 not be privileged. If there are individual facts obtained from
6 third agencies or hits, specific hits from a database code at
7 some third agency, we don't believe that that is privileged --
8 or, sorry, we accept that the Court has ruled that that is
9 privileged, but, for example, you know, the information about
10 USCIS determinations with respect to the reliability or whether
11 USCIS should continue using information that comes from a third
12 party generally, that is important information for this case and
13 not something that falls within the law enforcement privilege.

14 THE COURT: All right. Thank you, counsel.

15 I will hear from the defendants now. And one of the starting
16 points from the Court's perspective are points raised by the
17 plaintiffs regarding, for example, privilege logs, and they
18 assert that they lack page numbers, they have block redactions,
19 they have inconsistency in redactions, why can't you produce --
20 and why can't you produce the statistical information or data.

21 So let's start there, counsel.

22 MS. BRAGA: With regard to the privilege log
23 specifically, Your Honor?

24 THE COURT: Yeah, let's start with the privilege log. I
25 will get to the issues raised by the plaintiff, but I want to

1 start with the privilege log. These are specific questions that
2 I have.

3 MS. BRAGA: Okay. I think it was our understanding that
4 plaintiffs, following the January order, were no longer
5 challenging the sufficiency of the privilege log. Plaintiffs'
6 counsel might be able to speak to that.

7 THE COURT: Let me hear from plaintiffs' counsel.

8 MR. HYATT: Yes, Your Honor.

9 So after your ruling in early January on the first round of
10 the motion to compel, we told the defendants that we were
11 withdrawing the challenge, the formal challenge to the privilege
12 logs and the sufficiency of the privilege logs. Though I will
13 note, Your Honor, it is difficult for plaintiffs to assess the
14 challenges raised by the defendants given the lack of
15 specificity, the page numbers, or the lack thereof, especially in
16 the limited subset of documents that we have requested a rereview
17 of. But, yes, Your Honor, we have formally withdrawn that
18 challenge.

19 THE COURT: All right.

20 The next question for the defendants. You repeatedly
21 reference redactions were justified because, again, as counsel
22 for the plaintiffs has noted, and it's your words, it's
23 intertwined with third-party agencies. The Court always has
24 concerns when there are block redactions that that's an
25 indication -- or it's an assumption, perhaps -- that target

1 redactions were not considered. And it's difficult for the Court
2 to believe that the entirety of a document or page after page of
3 a document would necessitate being block or excluded.

4 Could you address that concern, counsel?

5 MS. BRAGA: Well, with regard to the law enforcement
6 redactions, Mr. Emrich does say in his declaration that USCIS
7 information was withheld only insofar as the disclosure would
8 provide insight into third-agency law enforcement information.
9 He then explains how USCIS information can involve third-agency
10 information. He says that in the USCIS documents there can be
11 investigative information obtained from law enforcement agencies.
12 There is also information and possibly screenshots of USCIS
13 databases and systems that interact with third-party databases,
14 such as texts, and that's a category of documents, and
15 particularly screenshots, that the Court has said may remain
16 redacted. And it also said that information from USCIS
17 administrative investigations may reference investigations of
18 third-party law enforcement agencies. So in those ways it
19 appears that USCIS documents can contain law enforcement --
20 information from law enforcement agencies.

21 Plaintiffs' counsel mentioned several categories of
22 documents. One that he mentioned was questions that USCIS
23 officers ask third parties. To the extent that those questions
24 implicate information maintained by the third-party agency, the
25 question, as well as the answer, would have to remain redacted.

1 Internal vetting procedures is another area that counsel
2 mentioned, which is redacted. It is our understanding that
3 solely internal USCIS procedures should not be redacted; however,
4 to the extent that even internal vetting can involve a reach-out
5 to third-party agencies or the discussion of information obtained
6 from third-party agencies, that information will remain redacted.
7 We have said in our motion that we redact information that is
8 truly indistinguishable from otherwise protected information,
9 specifically as defined in the Court's January order.

10 THE COURT: Let me ask you, counsel, if the Court orders
11 the defendants to provide in camera opportunity, are you
12 comfortable in representing to the Court that every page that has
13 been fully blocked would include either third-party agency
14 information or third-party intertwined information with USCIS?

15 MS. BRAGA: Yes, Your Honor. We have reviewed the
16 documents multiple times in the meet-and-confer process, and we
17 have produced multiple versions of them with lesser redactions,
18 and we believe at this point the only information that remains
19 redacted is third-party agency information or USCIS information
20 clearly implicating third-party agency information.

21 THE COURT: All right. Is it possible that you could
22 provide for these block redactions a summary of what's in that
23 document without attribution to the third-party agencies? In
24 other words, I'm trying to get to a point where there's some
25 degree of comfort that the plaintiff would have that there's a

1 justified, specific reason for that information.

2 Right now, the plaintiffs are assuming and guessing there has
3 to be something because of block redactions. I'm trying to get
4 toward resolution by you providing a summary of a block redaction
5 so that they at least have some semblance of an idea of what
6 content is being excluded.

7 MS. BRAGA: I think that would be something we could
8 speak with plaintiffs' counsel about. I think we would need some
9 clarity from them on what they are considering block redactions.
10 When they refer to block redactions, it's not always clear to us
11 that they mean entire page redactions. They could just mean a
12 large redaction. So in order to do that, I think we would need
13 from them a list of pages and the documents at issue that they
14 claim contain block redactions. I think our privilege logs
15 do provide that information in some respects. And as plaintiffs'
16 counsel said, they're no longer challenging the sufficiency of
17 the privilege log. To the extent that it would be helpful to the
18 resolution of the motion, I think we can commit, in conjunction
19 with plaintiffs' counsel, to {inaudible} redactions identified
20 for us.

21 THE COURT REPORTER: I'm sorry. Could you repeat that
22 last sentence?

23 MS. BRAGA: I think we can commit, in conjunction with
24 plaintiffs' counsel, to reviewing some block redactions and
25 possibly providing, you know, specific information to each block

1 redaction, should plaintiffs' counsel be willing to identify the
2 block redactions for us.

3 THE COURT REPORTER: Thank you.

4 THE COURT: Another question I have for the defense is,
5 they represent that you redacted information that plaintiffs
6 claim that they can -- public information that they can obtain
7 off of the Internet. And I don't know if there's a direct
8 response to that.

9 MS. BRAGA: They're referencing, I think, their training
10 slides and {inaudible.}

11 THE COURT REPORTER: I am sorry, counsel. I think you
12 are cutting out.

13 MS. BRAGA: Oh, I'm sorry.

14 To the extent that those documents say that the redacted
15 information was taken from the Internet, I think that it remains
16 redacted because it may be third-party information, and it's not
17 clear just from that that it's from a verifiable Internet source
18 or that the third party itself had released the information.

19 THE COURT: Okay. One second, counsel.

20 All right. Please continue. Please continue, counsel.

21 MS. BRAGA: Thank you, Your Honor.

22 I don't think we have anything to add to the law enforcement
23 redactions other than to say that we are redacting these
24 documents, third-party agency information or USCIS information,
25 that clearly implicates such information.

1 I did want to note, I know that Your Honor said that you had
2 access to the administrative record documents. As plaintiffs'
3 counsel had mentioned, we did do a bit of work in lessening the
4 redactions, even on the administrative record documents, before
5 the motion was filed. So I would caution the Court against
6 relying on those documents because it is likely that redactions
7 in those have changed at this point.

8 THE COURT: Thank you for clarifying that.

9 All right. Any further argument that you wish to make,
10 counsel for the defendants?

11 MR. KIPNIS: Your Honor, this is -- I'm sorry, Your
12 Honor. This is Brian Kipnis again.

13 I would just like to pick up on one point that you asked
14 plaintiffs' counsel about, which was why shouldn't you treat this
15 as a motion for reconsideration. I think one thing that needs to
16 be borne in mind here, I don't think any of the parties want the
17 Court to do extra work here. You instruct us to review and
18 re-redact these documents according to your order, and as
19 officers of the court, we endeavor to do that to our best
20 ability, and I think we're confident in the extent to which we
21 have done that. So we are more than willing, if the Court wants
22 to make that happen.

23 This is a situation {inaudible} --

24 THE COURT REPORTER: I'm sorry. "This is a situation"?

25 MR. KIPNIS: I'm sorry.

1 This is a situation in which you essentially are being asked
2 to double-check us on work that you asked us to do and that we
3 did to our best ability as officers of the court. I think that's
4 a very unusual request. I think to ask the Court to expend its
5 time double-checking us on our own work, without some very
6 distinct and palpable evidence that we didn't do what you told us
7 to do, is quite an unusual request. And so I think -- I think
8 that's what the Court was hitting on when it was asking if it
9 shouldn't regard this as a motion for reconsideration. So I just
10 wanted to make that point, Your Honor.

11 THE COURT: Well, counsel, that's a good point, but this
12 is a unique and --

13 THE COURT REPORTER: Your Honor, I'm sorry. "That's a
14 good point, but this is a unique and"?

15 THE COURT: -- challenging set of circumstances as to
16 the nature of the protections you're asserting by way of law
17 enforcement privilege, national security. So the Court has to be
18 very careful in making decisions as to whether or not -- and not
19 that I'm second-guessing you, counsel; that's not the point --
20 but the Court just wants to be right in making sure that your
21 assessment is consistent with the Court's assessment of the
22 scope of the law enforcement privilege and the national security
23 privilege and what that would represent.

24 So I'm not second-guessing you, but just out of curiosity, if
25 the Court were to undertake to consider reviewing the documents,

1 what volume are we talking about that are the subject of this
2 motion?

3 MR. KIPNIS: On that specific question, let me defer to
4 Victoria.

5 Can you answer that question?

6 MS. BRAGA: Sure. I believe it would be several --
7 documents.

8 THE COURT REPORTER: I'm sorry, Ms. Braga. Ms. Braga,
9 you are cutting out.

10 MS. BRAGA: Oh, I'm sorry. Can you hear me better now?

11 THE COURT REPORTER: Yes. Thank you.

12 MS. BRAGA: Great.

13 So I think it would be definitely several {inaudible} ...

14 THE COURT REPORTER: I'm sorry. "Several"?

15 MS. BRAGA: Possibly several hundred pages of documents.
16 It's {inaudible} --

17 THE COURT REPORTER: I'm sorry, Your Honor. I am having
18 a difficulty with Ms. Braga. It keeps cutting out.

19 Can you try again, Ms. Braga? I'm sorry.

20 MS. BRAGA: That's okay. Can you hear {inaudible} --

21 THE COURT REPORTER: I can hear you, and then it cuts
22 out, so let's try again and I will tell you what I can hear.

23 MS. BRAGA: Is this better?

24 THE COURT REPORTER: Yes. Thank you.

25 MS. BRAGA: Okay. So I think it would be several

1 hundred, not numbering into thousands of pages. Several of the
2 documents identified by plaintiffs, the certified administrative
3 record documents, are several hundred.

4 THE COURT: All right. Any further argument from either
5 plaintiffs' perspective or the defense perspective beyond what
6 you have already presented to this Court?

7 MR. HYATT: Yes, Your Honor. This is Heath Hyatt with
8 the plaintiffs. And just very briefly, Your Honor, I want to
9 clarify something that Mr. Kipnis said. The Court did not order
10 defendants to rereview all documents that had been produced and
11 were subject to the law enforcement privilege. And with the
12 exception of maybe one or two documents, the documents at issue
13 in this motion are different from the ones that were at issue in
14 the first motion. So I want to make sure that that is clear for
15 the Court. This is not asking the Court to check the documents
16 that were re-reviewed and reproduced after that initial order
17 from the Court.

18 Secondly, Your Honor, with respect to the questions that
19 USCIS officers are instructed to ask third agencies, this is a
20 really important point in the case. One of the key questions is
21 how USCIS corroborates information that they receive,
22 double-checks information that they receive, if they do at all,
23 from third agencies. And so understanding the questions that are
24 asked of third agencies, based on the information that they
25 receive, is important to our inquiry. And that's just one

1 targeted example, though, of a larger question in this case,
2 which is how USCIS confirms what third-agency information they
3 get is accurate and whether they do that reasonably.

4 The Internet citations or mention of redactions, Your Honor,
5 frankly, USCIS is putting them in their training manuals. So if
6 these -- if this information obtained from the Internet is in the
7 training manual, then it should be authentic and it should be
8 real and therefore something that is subject to discovery. So I
9 want to make sure that, you know, that that is -- that that point
10 is conveyed, that this is, you know, important information,
11 important enough to include in the training, but can be found
12 online, but because of the redactions, plaintiffs aren't able to
13 find it online or understand where it's coming from.

14 I believe that that's it, Your Honor, from my perspective,
15 unless Your Honor has any more questions. Thank you.

16 THE COURT: All right. And there's nothing further from
17 the defense on this point?

18 MS. BRAGA: No, Your Honor. I think we've addressed
19 each of those concerns.

20 THE COURT: All right, counsel, we normally take a break
21 after an hour-and-a-half session, and I don't want to burn up our
22 court reporter, so I want to make sure that we take our full
23 break.

24 So I have got just a couple of minutes before 11:00. We will
25 resume at 11:13. So if you will disconnect now, we will pick

1 back up with the remaining motion and the other matter the Court
2 wanted to address. So 11:13, we will come back on line.

3 MS. BRAGA: Okay. Thank you, Your Honor.

4 MR. KIPNIS: Thank you, Your Honor.

5 MR. HYATT: Thank you, Your Honor.

6 (Recessed.)

7 THE COURT: All right. Victoria, would you recall the
8 case once again, with the parties identifying themselves?

9 THE CLERK: Yes.

10 We are resuming our telephone conference in the matter of
11 Wagafe, et al., versus Trump, et al., Cause No. C17-94-RAJ.

12 If counsel could please identify yourself for the record
13 once again?

14 MR. HYATT: This is Heath Hyatt for the plaintiffs.

15 MS. BRAGA: Victoria Braga for the defendants.

16 MR. BRINKMAN: Drew Brinkman for defendants.

17 MR. KIPNIS: Brian Kipnis, Assistant United States
18 Attorney, for defendants.

19 MS. SLACK: Michelle Slack for defendants.

20 THE COURT: All right. Thank you once again.

21 We will now turn to the remaining motion, and that's
22 Docket 316, plaintiffs' motion to compel the A-files.

23 Counsel for the plaintiffs, you claim that the defendants are
24 not complying with the court order regarding the A-files and the
25 redactions are inappropriate.

1 My first question is, how do you know if the redactions are
2 appropriate if you can't see what's being redacted? Is this a
3 surmise or speculation, or what is it?

4 MR. HYATT: Yes, Your Honor. They're a little bit more
5 than educated guesses.

6 In respect to the document that was filed in the Hyatt
7 declaration, which was in the reply, the exhibit that we -- that
8 I'm about to vaguely reference was filed under seal, but some of
9 the redactions in that exhibit appear to be redactions of an
10 internal USCIS program to vet applicants. And as the Court
11 ordered, information that is USCIS originating information cannot
12 be redacted.

13 The other aspect, though, of the Court's order on the A-file
14 "why" information was plaintiff -- or, excuse me, defendants can
15 continue to redact information that originates solely within
16 third agencies. And there are other examples in the Sepe
17 declaration that was filed in the opening motion where it's clear
18 that defendants have gone beyond redacting information that just
19 originates from third agencies. For example, the mere fact that
20 USCIS contacts a third agency about an applicant is not
21 privileged. You know, again, this goes to one of those key
22 pieces of this case, and that is how USCIS evaluates,
23 corroborates, confirms the information that it receives from
24 third agencies, if it does at all.

25 So those are a couple of the clear examples, Your Honor, of

1 not complying with the letter and the spirit of the order in our
2 estimation, as well that there are examples in the Sepe
3 declaration of larger redactions, you know, a couple of block
4 redactions, but also an internal memo, or what appears to be an
5 internal memo, as well as internal communications about an
6 applicant. These things are very much not privileged, based on
7 the Court's order, and that's one of the reasons that we have
8 brought this motion today.

9 THE COURT: Counsel, what have you done since this
10 motion was filed to try and advance or resolve this issue?

11 MR. HYATT: Yes, Your Honor.

12 Again, plaintiffs, you know, have not had additional
13 communications with the government about this specific issue
14 since this motion was noted for consideration. But, again,
15 taking your comments from before, about the need for the parties
16 to try and resolve these issues, you know, it is something that
17 the plaintiffs will endeavor to try and reach a compromise with
18 the defendants, though we reached an impasse fairly quickly on
19 this issue when we tried to discuss it again before filing this
20 motion. You know, while we certainly, the plaintiffs, remain
21 committed to trying to work this out, there are some fundamental
22 disagreements here about what third-agency information is
23 privileged and what third-agency information should be allowed to
24 be presented in front of this Court. And, you know, I will say,
25 again, Your Honor, that the mere reference to third agencies

1 should not be privileged, but we understand that Your Honor has
2 ruled that factual information or investigative information that
3 relates from third agencies, as well as database codes, may
4 remain privileged, we do not challenge that ruling, but we do
5 believe that there is a fundamental disagreement here, and it's a
6 disagreement that is important to plaintiffs' prosecution of this
7 case.

8 THE COURT: And, counsel, do you need to know the name
9 of the third-party agency in these disclosures?

10 MR. HYATT: It's not so much the name of the third-party
11 agencies, Your Honor.

12 THE COURT: Counsel --

13 MR. HYATT: It would be the disclosure of the -- I'm
14 sorry, Your Honor.

15 THE COURT: No. Go ahead. My apologies for
16 interrupting. Please continue.

17 MR. HYATT: Thank you, Your Honor.

18 It's not so much the name of the third agency that is
19 necessarily of concern for us, although it is important because
20 USCIS or defendants may have other reports on the, you know,
21 effectiveness, validity, or usefulness of the information that comes
22 from those third agencies, but that it's the mere fact of
23 following up with the agencies, trying to work with the agencies
24 to resolve any kind of concern that may exist, or corroborate
25 whether any kind of communication exists. So the mere fact of

1 those communications occurring -- you know, not necessarily the
2 content -- but the mere fact of them occurring is certainly
3 information that is relevant to plaintiffs' claims. But the one
4 big one, Your Honor, is the determinations of somebody's status
5 or their category as a national security concern or potential
6 concern. You know, plaintiffs have alleged -- and it has been
7 revealed in publicly available documents through FOIA requests --
8 that USCIS uses categories to, in a sense, label people whether
9 they are a national security concern or what type of national
10 security concern they might be. That information is redacted as
11 well in these A-files.

12 THE COURT: All right. Thank you, counsel.

13 Any additional argument you wish to make on this issue,
14 counsel?

15 MR. HYATT: No, Your Honor. Other than to very briefly
16 reiterate the importance of nine, what USCIS does with the
17 information that it receives, that that is a key component to
18 this case, and we believe that information has been redacted in
19 the A-files. And we ask that you please order the defendants to
20 remove the redactions on that information, as well as others
21 outlined in the briefing.

22 THE COURT: All right.

23 Counsel for the defendant, Ms. Braga, will you be
24 responding?

25 MS. BRAGA: Yes, I will be.

1 THE COURT: My first question to you is about the extent
2 of the redactions. The scope of the order does not restrict
3 USCIS generated analysis information. Why can't the parties come
4 to some center point without the Court having to get involved by
5 in camera review or a line-by-line review of these documents?

6 MS. BRAGA: Thank you, Your Honor.

7 Before I answer your question, I do just want to say, if this
8 call is open to the public, or on a public line, I am somewhat
9 limited in what I can say about the A-files and "why" information
10 because that has been designated as "Attorney Eyes Only."

11 So with that being said, to the extent that "why"
12 information --

13 THE COURT: Let me stop you there, counsel. If you
14 believe, to advance your point, that you need to include or
15 incorporate a part of your response that needs to be closed to
16 the public, the Court can send an e-mail or a communication to
17 the parties with a secure line that would restrict the public, if
18 you are representing that, in order to be able to advance and not
19 violate attorney-client privilege or orders of the Court, if
20 that's the only way you can make your argument. So if you get to
21 the point that you believe that that's appropriate, then the
22 Court can make that determination if we need to. Is that
23 understood, counsel?

24 MS. BRAGA: Okay. Thank you.

25 THE COURT: Is that understood?

1 MS. BRAGA: Yes. Thank you, Your Honor.

2 THE COURT: All right. You may proceed.

3 MS. BRAGA: So I will tell you, to the extent that "why"
4 information exists in the A-files and it has been redacted,
5 defendants have done so consistently with the Court's July 9th
6 order.

7 I think plaintiffs' counsel misclassified the order a little
8 bit. In that order, the Court said that defendants may redact
9 "why" information contained within the A-files that originate
10 from law enforcement agencies; the Court also said defendants may
11 also redact communications between USCIS and these agencies
12 relating to this information; and then the Court finally said
13 defendants may not redact "why" information that originated
14 solely within USCIS. That information, to the extent that it
15 exists in the A-files, has been released to plaintiffs. To the
16 extent that plaintiffs are now reading this order to state that
17 defendants should be releasing also any sort of communication
18 between USCIS and third-party agencies, defendants believe that
19 it is clear in the July 9th order that that information is
20 protected.

21 To respond to some of the more specific claims that
22 plaintiffs' counsel made, I believe he referenced internal USCIS
23 information that appeared to be redacted. To the extent that
24 that exists and that it is redacted, I will say that USCIS
25 personnel can and does communicate with each other regarding

1 third-party law enforcement information. I will also say that
2 not all third-party law enforcement information that exists in an
3 A-file is "why" information. There may be third-party law
4 enforcement information existing in an A-file as a result of
5 background checks that is not related to a national security
6 determination. That information would remain third-party law
7 enforcement information, and it would be redacted.

8 THE COURT: Well, counsel, I have expressed this concern
9 before, in the last motion, and I will restate it again, is that
10 the large block redactions appear to suggest that there's no
11 line-by-line review. And I will reference you to Docket 317,
12 which is the Sepe, S-e-p-e, declaration, where whole pages are
13 redacted. Are you representing that there's no single sentence
14 or line in that document that can be produced?

15 MS. BRAGA: To the extent that block redactions exist in
16 the A-files and that those redactions are over "why" information,
17 such a block redaction would likely be because third-party law
18 enforcement information is being discussed or because the
19 information redacted is third-party law enforcement information
20 itself. For example, a memo from a third-party law enforcement
21 agency.

22 THE COURT: Again, coming back to the Court's suggestion
23 to alleviate concerns and providing summaries, particularly as it
24 relates to block redactions, is that something that is considered
25 or has been considered, or is that even a realistic opportunity

1 which you could discuss with opposing counsel?

2 MS. BRAGA: I think we could discuss it. As we
3 referenced in our filings, we have provided opposing counsel with
4 privilege logs, which should explain exactly the type of
5 information that has been redacted, and opposing counsel has not
6 challenged our privilege logs in this respect.

7 With regard to some of the information or some information
8 that may exist within the A-files, even a summary might not be
9 possible. I think, again, if plaintiffs' counsel are willing to
10 identify each block redaction that they are concerned with, we
11 can see if we can provide any additional information other than
12 what is said in the privilege log.

13 What I would note in this respect is that plaintiffs
14 essentially are contending that the government did not adequately
15 comply with the Court's July 9th order. We understood that the
16 Court's July 9th order ordered us to take a look at and lessen
17 the redactions in the A-files, and we did that. We did it in
18 good faith, and we believe we did it correctly. And we see
19 plaintiffs' motion challenging the A-files and challenging our
20 understanding of the order, and essentially, as we have discussed
21 before, asking the Court to check our work, and we don't think
22 that that's necessary or appropriate.

23 THE COURT: Counsel, the last point that was made by
24 plaintiffs was, with emphasis, they need to know what USCIS has
25 done with information that they may have received from third

1 parties. Is it your contention that that type of information is
2 not subject to disclosure, or what is your position?

3 MS. BRAGA: I think it would be a case-specific inquiry.
4 Again, I think the Court's order is clear that the defendants may
5 not redact "why" information that originated solely within USCIS,
6 but to the extent that USCIS personnel is talking about "why"
7 information that originated with a third agency, or to the extent
8 that they're communicating with a third agency, yes, it is the
9 government's position that, very clearly under this July 9th
10 order, that information can remain redacted.

11 THE COURT: Okay. Anything further from the defense?

12 MS. BRAGA: I'm sorry, Your Honor?

13 THE COURT: Anything further, counsel?

14 MS. BRAGA: I don't think there's anything further from
15 the government on this.

16 THE COURT: All right. Let me hear from the plaintiff.

17 MR. HYATT: Thank you, Your Honor.

18 Just a couple of quick points. I want to make clear for the
19 record that in my opening comments I endeavored to not reveal
20 anything subject to protective order, and I believe I was
21 successful in that endeavor. I will continue to do so, but
22 wanted to state that for the record.

23 With respect to third-agency communications, the redaction in
24 the Sepe declaration, Your Honor, with respect to those
25 third-agency communications, are what appear to be USCIS notes of

1 those communications and the fact that the communications
2 occurred; not the content of the communication, not facts
3 originating within any third agency. This is USCIS work that
4 they are doing to, in theory, corroborate or check the
5 information that they have received from third agencies.

6 It's also worth noting, Your Honor, that there is, you know,
7 considerable information that comes from third agencies to USCIS
8 that USCIS considers when it is making these determinations, and
9 that is really the crux of why this issue is so important and
10 why, you know, we have stressed that the intertwining of
11 information or some of these analyses of third-agency
12 communications or facts are important for discovery and, you
13 know, must be produced, to the extent that they don't conflict
14 with previous orders.

15 The last piece, Your Honor, is I wanted to make clear that
16 this motion is just -- it's not just about checking work. You
17 know, yes, we believe that there are instances where the Court --
18 excuse me, where the defendants have not complied with the letter
19 and the spirit of the Court's order, but that there is some new
20 information that, you know, plaintiffs do seek, and that's some
21 clarity in this USCIS analysis that the defendants continue to
22 redact, despite orders from the Court.

23 And with that, Your Honor, if there is any further questions,
24 I would be happy to entertain them and answer them, but that's
25 all I have.

1 THE COURT: All right. Would you, counsel, express your
2 concern about what clarity looks like that would address your
3 concerns, other than filing a motion?

4 MR. HYATT: I'm sorry, Your Honor. Would you repeat
5 your question?

6 THE COURT: Certainly.

7 Have you expressed or communicated to defense counsel what
8 clarity looks like that would address your specific concerns?

9 MR. HYATT: We have certainly had discussions about our
10 respective positions about what information should be redacted
11 and unredacted. We have voiced our concerns in numerous
12 communications and across different issues about what issues we
13 still have with respect to these documents.

14 With respect to this motion in particular, plaintiffs would
15 endeavor to work with defendants to try and provide more
16 specificity or clarity, but I'm not sure how we could be more
17 helpful at this point to them because we, in all honesty, Your
18 Honor, can't be sure exactly what we are looking at. We can only
19 surmise based on the documents that are unredacted or the
20 portions that are unredacted and make conclusions based on the
21 redactions that are there and the consistency of the documents
22 themselves. But as has been a theme today, Your Honor, we would
23 certainly endeavor to be more clear and specific in any kind of
24 future request to opposing counsel.

25 THE COURT: Okay. All right. Counsel, this is what I'm

1 going to do as it relates to the four separate motions. I'm just
2 not satisfied that the parties have engaged and exhausted their
3 efforts at resolving the conflicts that you have. The Court has
4 even thrown out suggestions such as, for example, one, the
5 preamble. That wasn't something I thought about last night, but
6 the more I heard from the parties, it became quite clear to me
7 that that was the type of suggestion or approach, just thinking
8 outside the box, to resolving your differences in calling all the
9 parties -- or calling all the individuals that are the topic of
10 the second motion.

11 These are things that the parties can do and should have done
12 as opposed to just kicking it to the Court and waiting for the
13 Court's final determination. I think you can do a lot more work
14 on this case. I think you can do a lot more engagement in terms
15 of a meaningful meet-and-confer. There needs to be more give and
16 take from the parties if you wish to advance this case to a trial
17 opportunity. Because I'm not satisfied that the parties have
18 been doing that up to this point in time.

19 So I'm going to strike all four motions. I'm going to set
20 two weeks from today's date for the parties to have gotten
21 together. And I want the parties to file a joint submission
22 briefly summarizing exactly where the parties are as it relates
23 to all four of these motions. I don't want new motions filed.
24 That's not what I'm asking. I want a joint submission from the
25 parties that summarizes exactly where you are, what concessions,

1 what agreements that you have made, and hopefully how you have
2 resolved your conflict or concerns.

3 So today's date is May 14th. I'm going to set this for the
4 28th of May at 9:30 a.m. Is that clear for the parties?

5 MR. KIPNIS: Yes, Your Honor.

6 MS. BRAGA: Yes, Your Honor.

7 MR. BRINKMAN: Yes, Your Honor.

8 THE COURT: Plaintiff?

9 MR. HYATT: Yes, Your Honor.

10 THE COURT: Next, counsel, I told you I would get to the
11 issue of the sanctions motions, or sanction motions outstanding.
12 An order will be coming out more probably than not later today.
13 It's just about finished. And I'll give you a heads-up. It's
14 not what the plaintiffs are asking for, and it's not reduced to
15 what the defendants are asking for. So if that gives you some
16 idea of how judges resolve conflict, that's what we do. But,
17 nonetheless, you will have a determination this afternoon or, at
18 the very latest, tomorrow.

19 Next, counsel, there was a motion to stay the case schedule
20 in this case, and the Court required the parties to file joint
21 status reports each month so that I have some idea of where
22 things were. The next one being due on May 27th. And, again,
23 not much progress has been made other than the fact that these
24 motions were filed and the hearings set. And I don't know what
25 else you have been doing by way of preparation. We need to get a

1 case schedule that sets very specific deadlines and one that the
2 parties work toward.

3 What I have done in all my other civil cases that are set for
4 trial between now and August is set case schedules or get case
5 schedules issued so that the parties have clear guidance and
6 direction from this Court regarding dispositive motions deadlines
7 and discovery deadlines.

8 This Court has continued this multiple times and given the
9 parties multiple extensions, and I don't think we have progressed
10 to the point that a trial date -- any trial date the Court would
11 provide would be meaningful in any way. I know you want
12 resolution, but the only way you can get resolution is to have
13 some clear and firm deadlines. The Court has concluded that the
14 driver of moving not just this case but all of our cases is to
15 have a definite and defined case schedule. The driver is not the
16 trial date.

17 We're having a difficult time, as I imagine that you
18 understand, in trying to reconfigure and reconstruct what a jury
19 trial or what a trial is going to look like. There have been a
20 few attempts at trials across the country, or at least the
21 beginning of that process, either bench trials or through video
22 conferencing and some other means, but far short of having a jury
23 trial. Our jury committee has even engaged in getting
24 information from other jury trials that were put in recess when
25 the stay-at-home orders were issued by governors in respective

1 states, and jurors were loath to come back to the courthouse.
2 And many of the jurors expressed that if it were a question of
3 their health compared to the defendant's or the litigant's right
4 to a trial, their health would take paramount concern for them.

5 So I can let you know that a jury trial is not something
6 realistically that we will be able to accomplish any time in the
7 near future based on what we know right now. But I do want to
8 have this case ready so that if we do have a window, if some of
9 the other criminal cases do fold and resolve by plea or other
10 means, that I can start marshaling in the opportunity for the
11 parties to get their cases tried. The only way that that is
12 going to take place is if the parties are ready and we have
13 addressed dispositive motions and we have addressed any final or
14 any remaining discovery issues that might be outstanding.

15 Just one second. I'm sorry. I'm trying to check the
16 background noise out.

17 But, nonetheless, we need to have a case schedule so that the
18 parties understand that these are deadlines that we need to have.
19 So when you submit that summary to the Court -- and I'm going to
20 require that to be filed two weeks from today, and I would like
21 that summary to be provided that last week in May, let's say the
22 26th, and then the hearing will take place on the 28th -- I would
23 like your proposed case schedules for deadlines, for dispositive
24 motions, as well as deadlines for discovery, for it to be closed.
25 This way, I think all of you will move in a more positive

1 direction, we can get clarity on the issues, and advance your
2 opportunity for trial.

3 Counsel for the plaintiff, Mr. Hyatt, any questions?

4 MR. HYATT: No, Your Honor. Thank you for your time
5 today.

6 Just one point of clarification, though. The parties have
7 agreed to a bench trial in this case. You know, nonetheless, we
8 will be -- we will endeavor to come up with a schedule to get
9 this trial ready, and we will continue to work together and be
10 ready for the next hearing in two weeks.

11 Thank you, Your Honor.

12 THE COURT: All right.

13 Counsel for the defense, Ms. Braga?

14 MS. BRAGA: No, Your Honor. Thank you for your time
15 today.

16 THE COURT: Mr. Kipnis, you jumped in a couple of times.
17 Is there anything further from you as well?

18 MR. KIPNIS: No. No, Your Honor. I think my jumping in
19 is probably done for the day. Thank you very much.

20 THE COURT: Okay. And I think that the other lawyers
21 for the defense haven't added anything, so I'm sure that they
22 have no additional issues. Is that correct? Ms. Slack?

23 MS. SLACK: Yes, Your Honor. This is Ms. Slack.

24 I just wanted to note the stage of the case right now. We
25 have a number of depositions still to be completed that have been

1 impacted by the conditions of the pandemic, and I didn't know if
2 the Court wanted to speak to the expectations about how we do
3 those in the sort of uncertain times that we have right now.

4 THE COURT: Well, counsel, to be honest with you, other
5 cases I have had where they have had deposition issues, they're
6 doing depositions by video. And I will tell you that the Court
7 will be accommodating, particularly if this is going to be a
8 bench trial, to allow a witness to testify by video. We're
9 trying to reduce the concern that people have coming to the
10 courthouse for safety reasons. People are reluctant to come to
11 the courthouse, from what we can anticipate and from what we have
12 learned from other jurisdictions. And so video depositions are
13 something that you should meaningfully engage in at this point in
14 time, unless you have some specific concerns. The issue of "We
15 can't address credibility on video," I think, hopefully, we're
16 beyond that issue. It's been at least raised by some
17 individuals. That shouldn't be a concern in a case of this type.
18 If you believe it is, you can bring it to the Court's attention,
19 but I see no reason why you can't do video depositions. It may
20 be complicated, but I think you can work through that, just as
21 the Court has been working through the hearings that we have been
22 able to handle.

23 Does that answer your question?

24 MS. SLACK: I would just mention, as the Court has
25 acknowledged already today, that this case is unique and it

1 presents particular challenges, particularly because of the law
2 enforcement sensitive nature of a lot of the material that we're
3 dealing with, which also further complicates the ability to do
4 some depositions by video, and note that the seven-hour
5 depositions we've already held, because of breaks that were
6 necessary to discuss the multiple privileges implicated in this
7 case, have resulted in 12-, 13-hour days for us. So I just
8 wanted to note that. But we will certainly do our best to try to
9 get the case moving forward more, though we have been trying to
10 do as much prep work on the case as we can under the
11 circumstances and have progressed on a number of fronts, as
12 reported to the Court in the last report.

13 THE COURT: All right. Well, counsel, I have indicated
14 the Court is engaging in outside-the-box efforts to address the
15 multitude of cases that we have and engaging in extraordinary
16 measures in these extraordinary times. And so you may have to do
17 some things that you haven't done before by way of the
18 depositions or trial preparation if you want this case to go
19 forward. So if it presents a problem, please let the Court know
20 in lieu of filing a motion. I would be much more amenable to
21 dealing with it like that as opposed to just having to push the
22 issue or push resolution much further down the road. I want to
23 give you an opportunity to get it done and get your answer sooner
24 as opposed to later. So if you have conflict or problems, just
25 call Ms. Ericksen and let her know, and we can schedule something

1 to help you resolve whatever that issue is.

2 MS. SLACK: Thank you, Your Honor.

3 THE COURT: I think the last person I didn't speak with
4 is Mr. Brinkman.

5 Mr. Brinkman, anything further from you?

6 MR. BRINKMAN: Nothing from me, Your Honor. Thank you.

7 THE COURT: All right. Thank you all for participating
8 and agreeing to appear by telephone conference. And thank you to
9 the court reporter as well for your patience with the difficulty
10 in constantly hearing what's been said.

11 We will be in recess. Thank you.

12 MR. KIPNIS: Thank you, Your Honor.

13 MR. HYATT: Thank you, Your Honor.

14 MS. BRAGA: Thank you.

15 (Adjourned.)

16

17 C E R T I F I C A T E

18 I, Nickoline M. Drury, RMR, CRR, Court Reporter for the
19 United States District Court in the Western District of
20 Washington at Seattle, do certify that the foregoing is a correct
21 transcript, to the best of my ability, from the record of
22 proceedings in the above-entitled matter.

23

24 /s/ Nickoline Drury

25 Nickoline Drury